No. 80-1277

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SUPREME COURT OF THE UNITED STATES

October Term, 1980

STEVE SMITH, Superintendent, Kentucky State Reformatory - - - - - - Petitioner

versus

JAMES H. BROWN III - - - - - Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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April 15, 1981

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QUESTION PRESENTED FOR REVIEW

Whether respondent was denied his rights to equal protection and due process guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution when the Kentucky Supreme Court dismissed his direct appeal without a hearing on the merits after denying his appointed counsel's timely request for an extension of time which was necessitated by his heavy workload?

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are the Sixth and Fourteenth Amendments to the United States Constitution.

COUNTERSTATEMENT OF THE CASE

References are either to the Joint Appendix filed in the Court of Appeals for the Sixth Circuit (JA) or to the Appendix to the petition for a writ of certiorari (A).

Following his conviction for murder in Mason County, Kentucky Circuit Court and sentencing to twenty years in prison, respondent James H. Brown III filed a timely Notice of Appeal to the Kentucky Supreme Court. On November 5, 1976 the trial judge granted Brown leave to proceed on appeal in forma pauperis and counsel McNally of the Office of Public Defender was appointed to represent him. The record on appeal was timely filed February 14, 1977. On March 16, 1977 Brown filed a timely request for an extension of time of thirty days to file his appellate brief (JA, 7). Brown requested an additional thirty day period in which to submit his brief pursuant to Kentucky Rules of Appellate Procedure (hereinafter RAP) 1.230 and 1.450(a) and Kentucky Civil Rule (hereinafter CR) 6.02, which states in pertinent part:

> CIVIL RULE 6. TIME
>
> CR 6.02 Enlargement
>
> When by statute or by these Rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may, at any time in its discretion, (1) with or without motion or notice order the period enlarged if request therefore is made before the expiration of the period originally prescribed or as extended by a previous order . . .

As grounds for the requested extension Brown through his appointed counsel McNally stated, *inter alia:*

3. Undersigned counsel has not been able to do the necessary research and drafting in order to file appellant's brief within the required period. During and immediately prior to the briefing period, undersigned counsel has submitted briefs to this Court and the Court of Appeals on February 1, 1977; February 3, 1977; February 7, 1977; February 14, 1977; February 21, 1977; February 24, 1977; March 1, 1977; March 9, 1977; and two petitions for rehearing on March 10, 1977. In addition, undersigned counsel, during the briefing period, participated in oral argument before this Court on February 16, 1977, submitted two lengthy Motions for Bail Pending Appeal to the Court of Appeals on February 8, 1977 and March 2, 1977; submitted two motions for bail pending appeal in the lower courts on February 24, 1977 and March 3, 1977. In addition, undersigned counsel has, during the extension period, research and prepared a motion under RCr 11.42 which will be filed in the Franklin Circuit Court this week.

4. Undersigned counsel appreciates this Court's demand that the procedural time periods on appeal not be taken lightly. Undersigned counsel requests this extension only because he has no alternative. The workload enumerated in paragraph three, which does not include the numerous other tasks assigned to counsel, simply did not permit undersigned counsel time in which to adequately review the record, research and prepare arguments to submit to this Court.

5. Undersigned counsel does candidly state to this Honorable Court that it could have theoretically been possible to file the brief in the above-styled case within the briefing period. However, in order

> to have accomplished this task, it would have been necessary to request extensions of time for many of the ten (10) briefs filed within the last forty-four (44) days. Many of these briefs were facing deadlines which this Court and the Court of Appeals have indicated are *FINAL*. Undersigned counsel has decided to request an extension of time because of caseload considerations but also because of considerations of judicial economy and efficiency. Undersigned counsel has requested only *three* extensions of time from any appellate court since January 13, 1977, thus substantially reducing the undesirable and time consuming drain on appellate court energies. Undersigned counsel has attempted to marshall his time in such a way as to benefit the majority of his clients as well as to benefit the appellate courts of this Commonwealth (JA, 8-9).

Brown cited *Anders* v. *California,* 386 U. S. 738 (1967), in support of his motion (JA, 9). The Commonwealth of Kentucky did not respond to this motion. On March 30, 1977, the Supreme Court of Kentucky granted a "final extension to and including April 15, 1977, for filing briefs" (JA, 9). On April 15, 1977, Brown, represented by undersigned counsel McNally, requested an additional extension of time of seventeen days, to and including May 2, 1977, in which to file the brief on appeal (JA, 9-10). As grounds for this motion, Brown stated, *inter alia:*

> 2. During the requested extension period undersigned counsel has submitted two lengthy briefs to this Court in murder cases on March 29, 1977 and

April 4, 1977. In addition, undersigned counsel has also submitted a lengthy "Motion for Enlargement of Time for Filing The Brief on Appeal or, in the Alternative, Motion for Clarification of the Status of Appellant's Appeal" on March 29, 1977. Also, undersigned counsel has submitted two briefs to the Court of Appeals on April 8, 1977, and April 11, 1977, as well as participating in oral arguments on April 6, 1977 and April 13, 1977.

3. Appellant is free on bail pending appeal. This is a very significant factor to undersigned counsel, as it must be to this Court. Undersigned counsel was and is fearful that requesting the initial, and now another extension of time in which to file the brief might be seen as tactics of delay. It is not. Undersigned counsel has no wish to try the patience of this Court in any case, but most especially not in a situation where the client is free on bond pending appeal. Undersigned counsel has struggled to file this brief within the requested extension period. However, it could not be done.

4. Because of the workload enumerated above, *and because of the nature of this case* undersigned counsel has not been able to complete the necessary research and drafting of appellant's brief within the requested period. Substantial work has been completed in the preparation of the brief. Nineteen potential errors have been identified in the record on appeal. Five have been identified (thus far) as not worthy of argument. Four arguments have been completed, except for minor revisions. Those allegations of error are, in brief:

I.

Refusal of the trial court to permit the defense to have independent expert analysis of crucial evidence.

II.

Refusal of the trial court to permit the defense a continuance of one to three days in which to prepare to cross-examine a *suprise* prosecution expert who employed a new blood identification theory of a highly complicated nature whose testimony forms the only real evidence against appellant.

III.

Failure of the trial court to grant appellant's motion for a directed verdict.

IV

Failure of the trial court to follow the mandatory sentencing procedures of KRS 532.050.

Other issues which will probably be raised (depending on the results of further research) on appeal include, but are not limited to: (1) an indictment which does not charge a crime; (2) introduction of hearsay, incriminating statements by appellant's co-indictee who did not testify; (3) improper closing argument employing use of "probabilities" of guilt which have no basis in fact, the evidence at trial, or in any scientific theory of probability; (4) a defective murder instruction; (5) failure to instruct on lesser included offenses; and (6) refusal to grant a change of venue.

5. In addition to allowing time for typing and printing of appellant's brief, there is one reason why an extension of seventeen (17) days is required in which to file appellant's brief. One argument which was not mentioned above and which will be raised on appeal is the introduction, over objection, of the testimony of Dr. Robert Charles Shaler at trial. [Transcript of Evidence, pp. 128-134, 136-140, 148-165]. Dr. Shaler was a *surprise* expert witness who testified that blood on appellant's boots was not appellant's despite the fact that the blood on the boots and appellant's blood were both type "A" blood. Dr. Shaler is the major (and possibly only) exponent of a new theory of blood identification called "G.M. Blood Grouping." To Dr. Shaler's knowledge, this test has been introduced in only one prior case in the United States. Trial counsel objected to Dr. Shaler's testimony on the basis that the test has not been proven accurate or reliable. (This allegation of error is to be distinguished from the defense request for a continuance). Undersigned counsel is having some difficulty researching the reliability of this novel procedure because of the paucity of published material. The record reveals two articles by Dr. Shaler: "Individualization of Forensically Important Physiological Fluids" (unpublished, which deals with his test) and "Simultaneous Electrophoresis of Peptidose A, Phosphoglucomatose, and Adeny Late Kinase" (published, which apparently does not relate to Dr. Shaler's new test). Obviously, this subject matter is highly complex and additional time is needed to present an argument to this court with clarity and accuracy. This issue is of extreme importance to

> this appeal because Dr. Shaler's testimony was the principal basis for appellant's conviction.
>
> 6. Hopefully, it is clear from the above that this request for an extension of time is *not* due to "general conditions of counsel practice." Undersigned counsel begs this Court to grant this extension of seventeen (17) days to insure an adequate appellate brief (JA, 10-12; emphasis in original).

Brown again cited *Anders* in his motion and argued that the requested extension was necessary in order to complete a competent, professional appellate brief (JA, 12). The Commonwealth filed no response to the extension motion. On May 2, 1977, Brown tendered an 85 page brief raising eleven allegations of error, nine of which were alleged to be violations of constitutional magnitude (JA, 12). The issues raised in Brown's brief, as stated therein, are as follows: failure to prove the elements of the offense, improper admission of evidence of novel "blood grouping" theory, failure to grant a continuance when a surprise expert was called, denial of request to produce evidence for scientific analysis, failure to grant a change of venue, improper admission of hearsay testimony, improper "probability" closing argument by the prosecutor, failure to instruct the jury on second degree manslaughter, fatally defective indictment, admission of testimony

about evidence without establishing chain of custody, and improper sentencing.[1]

On May 18, 1977, sixteen (16) days *after* Brown's brief was tendered to the Supreme Court of Kentucky, the Court denied without comment Brown's motion for an extension of time in which to file the brief (JA, 14). On May 31, 1977 Brown filed a lengthy "Motion and Affidavit for Enlargement of Time for Filing the Brief on Appeal" (JA, 14-15). Brown repeated the previously enumerated justifications for the requested extension and also *swore*:

> Undersigned counsel respectfully asks this Court to recognize the fact that he is proceeding in good faith and has, considering the limitations outlined above, diligently prosecuted this appeal. Furthermore, undersigned counsel wishes to impress upon this Court that he has devoted no time (with the exception of one motion for certificate of probable cause in a case filed by his predecessor) to litigation in the federal courts. His time has been almost exclusively spent in handling direct appeals to this Court and the Court of Appeals (JA, 14).
>
> * * * *
>
> In the case at bar another extremely important factor must be considered. The undersigned counsel is a public defender who represents indigent

[1]Petitioner notes in his petition that Brown has never claimed constitutional error at his state trial in federal court (Petition For a Writ of Certiorari, hereinafter P, 5, 14). Of course, any federal attack on Brown's conviction would be premature at this time. Brown must first litigate his right to a state court appeal. However, Brown does assert numerous serious constitutional violations at his trial.

defendants on appeal to this court. Unlike the attorney in private practice, the undersigned counsel lacks the ability to decline to represent an indigent appellant simply because he already has a large volume of work.

Under Canon 2 of the Code of Professional Responsibility, "[a] lawyer should assist the legal profession in fulfilling its duty to make legal counsel available." The negative implications of that canon require that "[e]mployment should not be accepted by a lawyer when he is unable to render competent service." EC 2-30, Code of Professional Responsibility. "The lawyer deciding whether to undertake a case must be able to judge objectively whether he is capable of handling it and whether he can assume its burdens without prejudice to previous commitments." Professional *Responsibility: Report of the Joint Conference,* 44 A.B.A.J. 1158, 1218 (1958). Unfortunately, this ethical alternative is not actually available to the public defender attorneys representing indigents on appeal since there are many more appellants requiring assistance of counsel on appeal than there are available appellate defender counsel.

Consequently, the undersigned counsel, like other members of the appellate division of the Office of Public Defender, may be required to assume a larger volume of work than he would normally accept under other circumstances. As a result, the undersigned counsel may be ethically required to seek extensions of time for filing an appellate pleading in one case so that he may devote sufficient time to completing an appellate brief for a different defendant (JA, 14-15).

Brown raised various other arguments, describing the impending denial of effective assistance of counsel and equal protection of the law as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, as well as Section 11 of the Kentucky Constitution (JA, 15). Additionally, Brown noted that no prejudice had resulted to the Commonwealth from his request for an extension of time (JA, 15), and that even if the Kentucky Supreme Court believed appointed counsel McNally was engaging in dilatory and unprofessional tactics the sanction against the innocent appellant was misplaced (JA, 15). The Commonwealth did not dispute appointed counsel's *sworn* claims and in fact did not even file a response to the motion. On June 30, 1977, the Kentucky Supreme Court denied Brown's motion without comment (JA, 15).

On July 11, 1977, Brown moved the Supreme Court of Kentucky pursuant to RAP 1.345(b), RAP 1.450(a) and CR 6.02, to reconsider its most recent order (JA, 15). He relied upon *Anders; Douglas* v. *California,* 372 U. S. 353 (1963), and Section 115 of the Kentucky Constitution which guarantees the right to an appeal (JA, 15). On September 13, 1977, Brown's "Motion to Reconsider . . . and Motion for Oral Hearing of Motion" was denied without comment and despite the absence of opposition or response from the Commonwealth (JA, 15-16).

On September 19, 1977, the Attorney General moved to dismiss Brown's appeal, moved to relieve himself of the obligation to file a brief, and moved to

affirm Brown's conviction (JA, 16). The Commonwealth did not cite any authority for the requested relief, nor did it dispute any of Brown's counsel's claims or demonstrate any prejudice. On September 29, 1977, Brown filed a response opposing the dismissal of the appeal on various federal constitutional grounds previously alluded to and requesting an oral hearing to help resolve "the very important issues before" the Court (JA, 16). In the alternative, undersigned counsel McNally moved the Court to permit him to withdraw as counsel of record and for appointment of substitute counsel for Brown who would be permitted to file a timely brief on his behalf (JA, 16). The same date Brown filed a *pro se* motion requesting similar relief and also requesting leave to file his own *pro se* brief on appeal (JA, 16).

On October 5, 1977, the Kentucky Supreme Court overruled Brown's counsel's motions, ignored his *pro se* motion and dismissed his appeal without comment (JA, 16).

Petitioner has adequately described the procedural history of Brown's journey into federal court, then into state court and back to federal court (P, 5-7). However, it should be noted that the Attorney General filed a response to the initial Magistrate's Report which recommended denial of federal relief because of the availability of relief for Brown under Rule of Criminal Procedure (RCr) 11.42 in Kentucky and asserted that Brown had not exhausted his state remedies (JA, 37). When Brown thereafter filed his RCr 11.42 motion, the Commonwealth filed a brief response

stating that the Mason Circuit Court could grant relief if it found that counsel McNally had been ineffective (JA, 67-68). The trial judge entered an order granting Brown a belated appeal to the Kentucky Supreme Court after conducting two hearings at which counsel for the Attorney General failed to appear (JA, 74). Then, in spite of its responses to the Magistrate's report and the RCr 11.42 motion, the Attorney General filed an untimely[2] "Notice of Cross-Appeal" from the Mason Circuit Court's order (JA, 72).

Petitioner also notes that Brown tendered an 85 page brief the first time and a 46 page brief the second time (P, 5, 18). However, effective January 1, 1978 the Kentucky Supreme Court adopted CR 76.12(4)(c) which requires that the brief for appellant in that court not exceed 50 pages. Prior to that date no page limitation on briefs for appellants had existed. While a brief longer than 50 pages may be filed with leave of the court, Brown was unwilling to request such leave because of the history of his first aborted appeal. Despite the fact that all briefs were timely filed in Brown's second appeal, the Kentucky Supreme Court again dismissed his appeal based on the original failure of counsel to file a timely brief in the first appeal.

Finally, the Commonwealth's response to Brown's motion to reconsider his case and to issue the writ of habeas corpus included no request for a hearing on Brown's claims of denial of equal protection and effec-

[2]This "cross-appeal" violated numerous civil and criminal rules. See Brown's Motion to Dismiss Cross-Appeal filed in the Kentucky Supreme Court April 5, 1978.

tive assistance of counsel (JA, 75-76). After the Magistrate recommended that Brown be granted a belated appeal or, alternatively, a new trial, the Attorney General in his particularized objections included a one sentence alternative request for an evidentiary hearing *solely* on the issue of effective assistance of appellate counsel (JA, 92).

As petitioner has related, the district court on June 25, 1979 issued the writ of habeas corpus (JA, 97-98). The Commonwealth appealed that Court's judgment to the Sixth Circuit Court of Appeals which affirmed it on October 31, 1980 (A, 27-33).

SUMMARY OF ARGUMENT

The decision of the Sixth Circuit Court of Appeals in respondent Brown's case is factually correct and based on substantial and controlling legal precedent of this Court. The Sixth Circuit held that Brown was denied equal protection when his direct appeal to the Kentucky Supreme Court was dismissed without a hearing after that Court denied the timely motion of Brown's public defender for an additional seventeen days to file his appellate brief when that motion was necessitated by appointed counsel's workload. The Sixth Circuit held alternatively that Brown was denied his due process right to the effective assistance of appellate counsel.

Petitioner challenges Brown's counsel's workload claims for the first time before this Court. The Sixth Circuit noted that those claims were uncontested. The

Commonwealth never disputed counsel's sworn assertions in state or federal court despite countless opportunities to do so in person or by means of pleadings and did not even petition the Sixth Circuit for a rehearing of its decision. Now the Commonwealth attempts to challenge counsel's statements in this Court by vague innuendo years after the fact. Such sandbagging is obviously improper.

The heart of this case is that if Brown had been represented by retained counsel his appeal would never have been dismissed. Why? Because private attorneys are able and in fact ethically required to accept only as many cases as they can competently handle while Brown's public defender had no control over his careload and was required to accept more cases than he could process without requesting extensions of time. Brown's appointed counsel's attempt to withdraw as counsel of record was denied by the Kentucky Supreme Court. Brown's *pro se* requests for appointment of substitute counsel or leave to file a *pro se* brief were likewise denied. Thus Brown was denied the only direct appeal he was guaranteed by Kentucky's Constitution solely because of his indigency which constitutes a clear denial of equal protection of law as guaranteed by the Fourteenth Amendment.

Petitioner has not cited a single precedent, state or federal, outside of Kentucky, where a court has held that an indigent criminal appellant's appeal may be dismissed because his appointed attorney is too overworked to file a timely brief. Kentucky's views on this subject are clearly an unconstitutional aberration,

and the Sixth Circuit's decision in Brown's case will have only narrow ramifications. A grant of certiorari is not appropriate because the significance of this case is limited to Kentucky practice and is soundly based on numerous previous decisions of this Court. The issue is simply not of plenary national significance as suggested by petitioner. The Commonwealth at this late date, seeks to reopen a factual inquiry which is long since closed. The United States Supreme Court is certainly not the appropriate place to do so.

Finally, contrary to the Attorney General's contention, no legitimate state interest will be undermined by the decision in Brown's case. The Attorney General demonstrated no prejudice when he moved to dismiss Brown's appeal, and the Kentucky Supreme Court gave no reason for denying Brown's extension motion sixteen days *after* he tendered his brief for subsequently (months later) dismissing Brown's appeal or for subsequently (almost a year later) dismissing Brown's timely second appeal. Kentucky's ability to enforce its valid procedural rules will not be undercut by the Sixth Circuit's decision in Brown's case. If any court, state or federal, believes an attorney has acted improperly, that attorney, rather than his indigent client, can and should suffer the consequences. There is no substantial state interest at stake here.

REASONS FOR DENYING THE WRIT OF CERTIORARI

Contrary to the Suggestion of the Petitioner, the Decision of the Sixth Circuit Court of Appeals Is Factually Correct and Based Upon Substantial and Controlling Legal Precedent of This Court.

A. EQUAL PROTECTION RATIONALE

Citing *Cleaver* v. *Bordenkircher,* 634 F. 2d 1010 (6th Cir. 1980), which it stated presented the identical issue, the Sixth Circuit Court of Appeals affirmed the district court's judgment in Brown's case for the reasons enunciated in *Cleaver* (A, 27). In *Cleaver* the Court held that the indigent defendant was denied equal protection since he was represented on appeal by a public defender so overworked that he was unable to file a timely brief on the defendant's behalf (A, 31-32). That court noted that appointed counsel's assertions about his excessive workload had not been contested by the Commonwealth of Kentucky (A, 31-32). The Court concluded that because an affluent defendant who sought to retain an overburdened lawyer "could and would have hired another" the indigent defendant was deprived of equal protection since he was denied the right to appeal granted others by Kentucky's Constitution (A, 32). The Sixth Circuit relied on *Ross* v. *Moffitt,* 417 U. S. 600 (1974).

Petitioner now claims that Brown was not deprived of equal protection of law (P, 17-23). He urges that since the Sixth Circuit's opinion in Brown's case "set

out no facts" to show an equal protection violation "it cannot stand unless there is a due process right to state-court appeal" (P, 17). He contends that any overwork was "because of the exercise of appellate counsel's own independent judgment" (P, 18). He refers to Brown's claim of denial of equal protection in his habeas corpus petition was "secondary" (P, 18-19). He advances the notion that the record does not show "without dispute" that Brown was denied an appeal while wealthier defendants would have had one because he claimed in federal court that Brown "was in no way singled out" (P, 19). Basically, while the Commonwealth *never contested* in either state or federal court Brown's appointed counsel's claims that he needed additional time to file his brief because he was overworked,[3] it now seeks to challenge the decision of the Sixth Circuit on that ground.

Throughout the lengthy course of these proceedings the Attorney General has relied almost exclusively on

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[3]It should be noted that the Commonwealth did not even petition the Sixth Circuit Court of Appeals for rehearing after it issued its decisions in *Cleaver* and *Brown* holding that the workload claims of appointed counsel were uncontested. As a general rule, this Court will not consider contentions not presented to the court below. *See, e.g., Dorszynski* v. *United States,* 418 U. S. 424, 431 n. 7 (1974); *Jenkins* v. *Anderson,* ____ U. S. ____, 100 S. Ct. 2124, 2127 n. 1 (1980); *Anderson* v. *Charles,* ____ U. S. ____, 100 S. Ct. 2180, 2181 n. 1 (1980); *Sandstrom* v. *Montana,* 442 U. S. 510 (1979).

Moreover, while the Commonwealth states that in oral argument before the Sixth Circuit it noted that a hearing "could include an examination into claims of workload" (P, 19-20), the Sixth Circuit said in *Cleaver* that the state did not dispute the public defender's claims regarding workload in briefing *or argument before it* (A, 31).

its argument that there is no due process right to effective assistance of counsel on appeal and ignored the crux of this case. What happened in this case is that Brown's appeal was dismissed by the Kentucky Supreme Court *on account of Brown's indigency.* Because Brown was indigent he had to be represented by the public defender's office which was incredibly overworked at that time. Brown's public defender, undersigned counsel McNally, simply could not prepare and file all the appellate briefs which he was assigned without requesting some extensions of time. He had filed ten appellate briefs in less than six weeks when he requested the first thirty day extension (JA, 8-9). He had filed four more appellate briefs and a lengthy motion and participated in two oral arguments when he asked for the second extension of seventeen days (JA, 10). Moreover, he had completed four of the arguments for Brown's brief and begun researching seven more, one of which involved a novel and highly complex issue (JA, 11-12).

Brown's public defender, whose office could not refuse to represent indigent appellants, simply had so much other work to do that he was unable to complete Brown's brief in the initial thirty day extension period. *Had Brown been represented by a private attorney who had control over his caseload, his brief would no doubt have been timely filed.* That is the heart of this case.

It is incredible that the Attorney General should challenge appointed counsel's workload claims at this late date. Years ago when counsel in pleadings before

the Kentucky Supreme Court first swore to his inability to complete Brown's brief in the allotted time because of overwork, the Attorney General was silent. In all the proceedings before the federal district court, the Mason Circuit Court and again before the Kentucky Supreme Court he did not dispute counsel's sworn statements. Even before the Sixth Circuit he was mum on this point. Yet now, years after the fact, he chooses to dispute counsel's claims on the basis of speculation and innuendo. Surely this is sandbagging at its worst. *See Wainwright* v. *Sykes,* 433 U. S. 72 (1977).

The unpersuasiveness of petitioner's arguments is striking. Of course, the Sixth Circuit is not required to list the specific facts in Brown's case which demonstrate an equal protection violation (P, 17); it may properly refer to the opinion in *Cleaver,* a case where the facts relevant to its legal conclusion are identical. The notion that counsel was overworked because he simply chose to do "almost double the amount of research and work for the first defaulting brief" (P, 18) hardly deserves comment. The change in Kentucky's procedural rules made it necessary that the appellate brief be shorter. Moreover, counsel was not so overburdened at the time he filed the second brief and thus he was able to fine-tune his arguments. Finally, the "authority" on the obscure topic which Brown's counsel had so much difficulty researching and which the Attorney General claims he tendered (P, 18) was not on point. The suggestion that appointed counsel spent

time doing unnecessary research or drafting for the original brief is unfair.

Petitioner's contention that Brown's equal protection claim was "secondary" in his habeas corpus petition is absurd. It was his first assertion of constitutional error (JA, 4) and he briefed it extensively in his memorandum of law (JA, 17-22). Brown is puzzled by petitioner's argument that the record is in dispute about whether a wealthier defendant would have had an appeal while Brown did not because the Attorney General stated in his objections to the magistrate's report that Brown was not "singled out" (P, 19). The problem was not that Brown was "singled out" but that he was one of a number of defendants unfortunate enough to be represented by public defenders too overworked to file all the briefs they were assigned without requesting extensions of time.

Petitioner launches an all-out assault on both the Sixth Circuit's decisions in *Cleaver* and in *Brown* and on this Court's opinions about the rights of indigents with respect to state court appeals (P, 16-22). This Court is accused of authoring "a generation of imprecise and ambiguous opinions" on that topic (P, 16) and causing "Constitutional haziness" (P, 22), and the Sixth Circuit is described as speaking with "Constitutional uncertainty", allegedly pleading with this Court "to resolve the matter" while at the same time supposedly fearing reversal of its decision (P, 20).

In fact this Court's teachings on the rights of indigents in the state appellate and post-conviction processes have been quite clear. As the Sixth Circuit

emphasized, quoting *Ross* v. *Moffitt*, 417 U. S. at 606-607:

> The cases encompassed a variety of circumstances but all had a common theme.
>
> * * *
>
> [T]hey stand for the proposition that a state cannot arbitrarily cut off appeal rights for indigents while leaving open avenues of appeal for more affluent persons (A, 32).

The Sixth Circuit simply followed the mandates of *Ross* in deciding Brown's case. The *Cleaver* decision is thorough and well-reasoned. Contrary to petitioner's contentions the Court does not "seem uncertain" of its decision. In fact, the Court confidently based its decision on two rationales — equal protection and due process.

Petitioner's blatant misrepresentation of the federal district court's opinion requires comment. Petitioner claims that the district court was not "impressed with the secondary claims of appellate counsel's workload" and found it just as likely that counsel chose to ignore the Kentucky Supreme Court's plain directive as that he was overworked (P, 19). In fact the district court did not reach the equal protection issue (A, 41-43). The remark to which petitioner refers occurs in a footnote where the court notes the tenacity of counsel in their attempts to obtain an appeal for Brown "whether that error be the product of overwork, as was alleged in their motions for extension of time below, or a tacit decision to ignore a plain direc-

tive of the Kentucky Supreme Court" (A, 42). The court properly drew no conclusion about the issue it did not reach.

A very basic flaw in petitioner's reasoning is that he bases his argument on the notion that Kentucky did not deny Brown equal protection because "there has been no showing that Kentucky left the appeal door open for more affluent persons who *"did not follow its rules"* (P, 21; emphasis added). Brown's public defender's problem was not that he *did not* follow the rules; his extension motion was timely, procedurally correct and advanced good cause. The problem was that he *could not* file the numerous briefs that were his responsibility without requesting additional time to file some of them. His situation was not, therefor, analogous to a private attorney's, and the "appeal door" was left open for the clients of retained counsel who could control their caseloads but not for Brown whose appointed counsel could not.

Some background on the situation that existed at the time Brown's appeal was first dismissed may be helpful. In 1976, Kentucky enacted a new constitutional article pertaining to the judiciary. Among many changes, a new intermediate appellate court (the Court of Appeals of Kentucky) was created. Kentucky Constitution Section 111 (1976). The previous "Court of Appeals" became the Supreme Court of Kentucky. Kentucky Constitution Section 110 (1976). That Court's traditional backlog of cases was substantially reduced by the transfer of pending cases to the new Court of Appeals and by the new discretionary

nature of its jurisdiction. *Id.* Obviously, the Supreme Court began to hear cases more quickly. Unfortunately, this additional court increased the workload of the Public Defender. The Kentucky Office of Public Defender (now Office for Public Advocacy) which was (and still is) in its infancy (created in 1972) did not keep pace with the judicial branch in expansion of facilities and personnel. *See* KRS Chapter 31. One reason for this is that the Public Defender obtains funding from the taxpayer's reprsentatives — the legislature, which only meets every two years. Kentucky Constitution Section 36 (1850). It is also generally recognized that many citizens (and their representatives) are not inclined to appropriate funding (adequate or otherwise) to provide appeals for "convicted criminals." As the Kentucky Supreme Court began to hear appeals more rapidly, the Court also began to deny motions for extensions of time by appellate public defenders. In these cases, the Court began to dismiss appeals without a hearing on the merits. This is not an isolated case, but is one of a series of dismissals under identical circumstances.

As argued to the Supreme Court of Kentucky, the Canons of Ethics forbid a lawyer from accepting employment if he already has committed himself to other cases. EC2-30, *Code of Professional Responsibility: Professional Responsibility: Report of the Joint Conference,* 44 A.B.A.J. 1158, 1218 (1958). Unfortunately, the appellate public defender in Kentucky does not have this option. He is forced by the system to accept an abnormally large caseload. The public defender

must fulfill his ethical responsibility by seeking extensions of time *where necessary to adequate representation.*

The Kentucky Public Advocate's Office handles most (if not all) of the indigent appeals from criminal convictions in the Commonwealth. Therefore, because counsel has no control over his caseload, delays in processing appeals are sometimes inevitable. The only alternative the appellate public defender has to requesting an extension of time from the appellate court is to file a perfunctory brief. This alternative "remedy" to the problem facing the appellate public defender is no solution at all. It violates yet another constitutional guarantee of the indigent appellant—the effective assistance of appellate counsel.

In the present case, counsel was forced to subject himself to the Hobson's choice of rendering ineffective assistance of counsel by filing a perfunctory brief or, on the other hand, causing the indigent appellant to lose his right to appeal by failing to file a brief within the otherwise reasonable time limits set by the Kentucky Supreme Court. Since a criminal appellant represented by retained counsel would not be subjected to such peril, there has been in the present case a clear denial of equal protection of the law as guaranteed by the Fourteenth Amendment.

In the past twenty years, this Court has given "extensive consideration to the rights of indigent persons on appeal." *Ross* v. *Moffitt, supra,* 417 U. S. at 605. The seminal case is, of course, *Griffin* v. *Illinois,* 351

U. S. 12 (1956), where the requirement of the equal protection clause was simply and powerfully stated:

> *There can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Id.,* 351 U. S. at 19; emphasis added.

In *Douglas* v. *California, supra,* the rationale of *Griffin* was extended to appeals. Echoing *Griffin,* the Court stated:

> . . . there can be no equal justice where the kind of *appeal* a man enjoys "depends on the amount of money he has." (*Douglas* v. *California,* 372 U.S. at 355; emphasis added; quoting *Griffin* v. *Illinois,* 351 U. S. at 19.)

Finally, two cases decided on May 8, 1967, are directly applicable. In *Anders* v. *California, supra,* and *Entsminger* v. *Iowa,* 386 U. S. 748 (1967), the indigent appellant was initially provided with counsel on appeal. However, in both cases the indigent's counsel withdrew *(Anders)* or abandoned the appeal *(Entsminger).* This Court announced the critical holding that appointed counsel's failure to prosecute the appeal cannot work to deprive the indigent of his right to an appeal. This Court sought to establish procedures which "would merely afford the . . . [indigent] that advocacy which a non-indigent defendant is able to obtain." *Anders* v. *California,* 386 U. S. at 745. This Court stated:

> This procedure will assure penniless defendents the same rights and opportunities on appeal — as nearly as is practicable — as are enjoyed by those

> persons who are in a similar situation but who are able to afford the retention of private counsel.

Because of Brown's indigent status, he was appointed counsel who could not, in effect, file a timely brief. The Attorney General argues that this procedure is constitutionally permissible. In fact, the Commonwealth would have this Court believe that appointment of any counsel (no matter how incompetent, ill or otherwise incapable of filing a brief) is enough to satisfy the equal protection clause. Surely, *Anders* demonstrates the fallacy in the Commonwealth's argument.

The Sixth Circuit concluded that Brown's request for an additional extension of time to file the brief was necessary because of the workload of his public defender. The Supreme Court of Indiana has also demonstrated an admirable sensitivity to this rationale. In *Thomas* v. *State,* 242 N. E. 2d 919 (Ind. 1969), the Court stated:

> We wish to make it clear that we do not hold or intend to imply that the public defender was incompetent or acted in an improper manner. Confronted with twice the normal case load, he may well have done all that he possibly had time to do for the appellant. If he did so, he properly performed the duties of his office. On the other hand, *the appellant's rights can not be determined by the case load of the public defender.* It is reversible error not to provide a defendant in a criminal prosecution with adequate legal representation at each stage of the proceeding, regardless of the cir-

> cumstances which cause the public defender's office to become overloaded. If the public defender was too busy to adequately represent each of his clients, the court should have appointed other counsel to assist him in carrying out his responsibilities. (*Id.* at 925; emphasis added).

Both undersigned counsel McNally and Brown, acting pro se, specifically requested the Kentucky Supreme Court to appoint counsel for Brown who would be able to file a timely brief. Brown actually asked for leave to file his own pro se brief. The denial of these motions by the Kentucky Supreme Court is further evidence of a violation of constitutional magnitude.

Brown submits that contrary to petitioner's contentions, there simply is no valid state interest at stake in the present case. The *discretionary* penalty of Kentucky's rule which permits dismissal of an appeal for an appellant's failure to file a timely brief should not be used as vehicle for preventing a convicted criminal defendant from obtaining appellate review of his conviction. As pointed out in the Brief in Opposition filed in the companion case, *Bordenkircher* v. *Cleaver* (File No. 80-1278) at 17-21, a number of alternative remedies are available for violation of a valid procedural rule of a state appellate court. Kentucky's chosen remedy —punishing the client for the attorney's mistake—is

logically and constitutionally as unnecessary as it is inappropriate.[4]

In *Henry* v. *Mississippi,* 319 U. S. 433 (1965), this Court explained that:

> [A] litigant's procedural defaults in state proceedings do not prevent vindication of his federal rights unless the State's insistence on compliance with its procedural rule serves a legitimate state interest . . . If it does not, the state procedural rule ought not be permitted to bar vindication of important federal rights. *Id.,* 319 U. S. at 447-448.

Because counsel's motion for extension was procedurally proper, timely, and advanced "good cause" for the requested relief, the forfeiture under RAP 1.260(b) of appellant's right to appeal could serve no legitimate state interest. *Cf. Parrot* v. *City of Tallahassee, Florida,* 381 U. S. 129 (1965). Significantly, in each case dismissed by the Kentucky Supreme Court under identical circumstances, never has the motion to dismiss or the order dismissing the appeal demon-

[4]The Legal Malpractice Insurance Committee of the Kentucky Bar Association has proposed an alternative to dismissal of the client's appeal for procedural errors. The Committee advocates the imposition of fines, arguing that the fines would be effective in enforcing court rules and would be cheaper than malpractice suits. The proposed rule changes have been rejected by the Kentucky Supreme Court. Sixty-six (66%) percent of those responding to a recent Kentucky Bar Association poll "favor a system of fines for the attorney rather than dismissal of the cause." Laura L. Murrell, *Justice For The Client and Lower Malpractice Rates For All, A Suggestion for Appellate Procedural Reform, Kentucky Bench and Bar* at 12 (January, 1978).

strated prejudice to the Commonwealth or stated a rationale for the drastic relief requested or ordered.

It is obvious that there was no legitimate state interest at stake when Brown requested an additional seventeen day extension of time to file a brief in an extraordinarily complex case. The fact that the Kentucky Supreme Court did not deny his motion until sixteen days *after* Brown tendered his lengthy brief is further evidence. It is impossible to rationalize the dismissal of Brown's appeal as necessary to protect a valid state interest. State officials, even judicial officers, cannot, under these circumstances, invoke rules (which generally serve a valid state interest) which result in the denial of the indigent's right to appeal. *See Dowd* v. *United States ex rel Cook,* 340 U. S. 206 (1950), where otherwise valid prison rules prevented Mr. Dowd from sending out his appeal papers.

Finally, perhaps the Attorney General might at least admit that the words of the Seventh Circuit in *United States ex rel. Smith* v. *Twomey,* 486 F. 2d 736, 739 (7th Cir. 1973), are meaningful:

> To avoid federal intervention in future cases involving inordinate delays in processing state indigent appeals, the Chief Judge of the Circuit Court of Cook County (and, if necessary, the County Board) should ensure prompter filing of appellate briefs by the Public Defender of Cook County and by the State's Attorney of Cook County, even if appropriate personnel need be added to their staffs. . . . The rights announced in Griffin v. Illinois, . . . and Douglas v. Cali-

> fornia . . . cannot be allowed to become meaningless through understaffing of the state offices responsible for assuring those rights.

B. DUE PROCESS RATIONALE

The alternative rationale of the Sixth Circuit—that Brown was denied the effective assistance of appellate counsel—is adequately discussed in the Brief in Opposition filed in the companion case, *Bordenkircher* v. *Cleaver* (File No. 80-1278).

C. FINAL REMARKS

The decision of the Sixth Circuit in Brown's case is consistent with and in fact required by applicable decisions of this Court. Contrary to petitioner's claims (P, 23-24), the issue presented by this case is not "of plenary national importance." Petitioner has *never* cited any case where a court, state or federal, other than the Kentucky Supreme Court, has dismissed a criminal appeal because an indigent appellant's counsel was too overworked to file a timely brief. Thus the ramifications of the Sixth Circuit's decision are very limited. This case is not appropriate for review on writ of certiorari pursuant to Rule 17 of this Court.

CONCLUSION

For the reasons stated in this Brief, respondent Brown respectfully requests this Court to deny the petition for a writ of certiorari filed in his case.

Respectfully submitted,

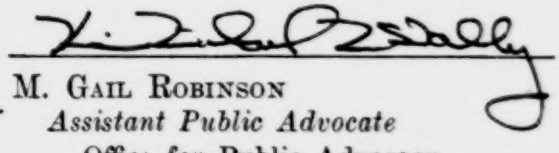
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PROOF OF SERVICE

I, M. Gail Robinson, co-counsel of record for respondent, hereby certify that three (3) copies of the foregoing Brief for Respondent in Opposition were served on petitioner by mailing those copies, U. S. postage prepaid, to petitioner's counsel, Hon. J. Gerald Henry, Assistant Attorney General, Capitol Building, Frankfort, Kentucky 40601 on April 15, 1981.



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